

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTON A. EWING,

Plaintiff,

v.

PHILIP A. FLORA (aka Phil Flora or
Philip Anthony Flora); EVERY DATA,
INC., an unknown corporation; EVERY
DATA, a fictitious business; DOES 1-
100; ABC CORPORATIONS 1-100;
LLC'S 1-100,

Defendants.

Case No.: 14cv2925 AJB (NLS)

**ORDER DENYING DEFENDANT'S
MOTION FOR SANCTIONS**

(Doc. No. 57)

Presently before the Court is a motion for sanctions filed by Defendant Phillip A. Flora DBA Every Data ("Defendant"). (Doc. No. 57.) Plaintiff opposed the motion and filed an opposition on March 1, 2016. Defendant filed a reply on March 8, 2016. Pursuant to Local Rule 7.1.d.1, the Court finds this motion suitable for determination on the papers and without oral argument.

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Accordingly, the motion hearing presently set for April 21, 2016 is **VACATED**.
For the reasons set forth below, Defendant's motion is **DENIED**.

BACKGROUND

The present motion for sanctions challenges Plaintiff's conduct throughout the course of this litigation. Accordingly, the Court summarizes the relevant procedural posture of this case as set forth below. For the sake of brevity, however, the Court also incorporates by reference the procedural history as detailed in Magistrate Judge Nita L. Stormes' August 26, 2015, order granting in part and denying in part Defendant's motion for a protective order. (Doc. No. 40.)

On December 11, 2014, Plaintiff filed a complaint against Defendant alleging claims for violations of the California Invasion of Privacy Act ("CIPA") (Cal. Penal Code § 630, et. seq.), conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962(d)), and the Telephone Consumer Protection Act ("TCPA") (47 U.S.C. § 227). (Doc. No. 1.) Plaintiff's claims arise from allegations that Defendant sent threatening text messages, unlawfully recorded telephone conversations, and impermissibly contacted Plaintiff in violation of the Do Not Call Registry. (*See id.*) Plaintiff is proceeding in this litigation pro se.

On January 6, 2015, Defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)¹ arguing Plaintiff had failed to state a claim upon which relief could be granted. (Doc. No. 3.) In addition to opposing Defendant's motion to dismiss, on January 29, 2015, Plaintiff moved for Rule 11 sanctions against Defendant Every Data, Inc. and defense counsel. (Doc. No. 11.) Plaintiff asserted several grounds for Rule 11 sanctions, including that defense counsel failed to cite controlling authority in moving to dismiss Plaintiff's claims. (*Id.* at 9.) Plaintiff also referred to defense counsel as a criminal, asserted defense counsel Babak Samini improperly used a different first name, and challenged whether Defendant Every Data Inc. properly paid its taxes and whether it

¹ All references are to the Federal Rules of Civil Procedure, unless otherwise noted.

1 was conducting business legally in California. (*See id.*)

2 In ruling on Plaintiff's motion for Rule 11 sanctions, the Court concluded the
3 complained of conduct was not appropriate grounds for sanctions, and that Plaintiff failed
4 to comply with Rule 11's safe harbor provision requiring service of a motion for
5 sanctions on opposing counsel 21 days prior to filing. (Doc. No. 20 at 13.) However, the
6 Court cautioned both parties and counsel with the following:

7 The Court does caution the parties to ensure that their legal
8 arguments are grounded in relevant and controlling authority,
9 and are not asserted for an improper purpose. Further, all parties
10 and counsel are to engage in professional and respectful
11 conduct, both in the legal arguments represented to the Court,
12 as well as in the course of communications with each other.
13 Failure to abide by the professional and ethical obligations
14 imposed upon attorneys who practice in this district is of
15 concern to the Court. Although Plaintiff is proceeding pro se,
16 he is reminded not to employ his pro se status as a means to
17 engage in improper and unprofessional conduct.

18 (Doc. No. 20 at 15–16.) The Court also dismissed Plaintiff's RICO claim with
19 leave to amend. (*Id.*) Plaintiff filed an amended complaint on April 24, 2015. (Doc. No.
20 21.) On May 14, 2015, Defendant filed an answer to the amended complaint, (Doc. No.
21 22), and discovery ensued.

22 During the course of discovery, several disputes arose between the parties
23 regarding deposition procedures, deposition scheduling, and responses to discovery
24 requests. (*See, e.g.*, Doc. Nos. 29, 32, 42, 44, 45, 56.) Of relevance to the instant motion,
25 on July 17, 2015, Defendant moved for a protective order to "ensure neither Phillip Flora
26 nor counsel are harassed by Plaintiff." (Doc. No. 29.) In addition to requesting a
27 protective order, defense counsel sought sanctions for Plaintiff's violation of this Court's
28 order stating Plaintiff should not use his pro se status to engage in improper behavior.
(Doc. Nos. 29, 38 at 3.) Following briefing, Magistrate Judge Stormes issued an order
granting in part and denying in part the motion for a protective order, striking irrelevant

1 documents from the record, and denying without prejudice Defendant's request for
2 sanctions. (Doc. No. 40.) The denial of Defendant's request for sanctions was without
3 prejudice to re-filing before this Court as Defendant cited this Court's admonition as the
4 court order Plaintiff violated. (*Id.* at 15.)

5 Then, in November 2015, Plaintiff filed a motion for sanctions and a protective
6 order against Defendant after defense counsel cancelled Plaintiff's deposition on two
7 occasions. (*See* Doc. No. 44.) Following briefing, Judge Stormes denied Plaintiff's
8 motion for sanctions finding defense counsel notified Plaintiff of the cancellation on each
9 occasion almost 24 hours in advance of the deposition, and that Plaintiff did not incur any
10 recoverable damages because of the cancellations. (*Id.* at 3.)

11 On February 12, 2016, Defendant filed the instant motion for sanctions before this
12 Court, citing to the March 26, 2015, order directing Plaintiff not to use his pro se status as
13 a means to engage in improper conduct. According to Defendant, Plaintiff's conduct
14 amounts to harassment for the sole purpose of delaying litigation, obfuscating the issues
15 before the Court, and extorting settlement from Defendant. Defendant seeks an order
16 holding Plaintiff in civil contempt and issuing terminating sanctions, or alternatively,
17 monetary sanctions for costs and fees incurred due to Plaintiff's violation of this Court's
18 order. Plaintiff alleges Defendant and defense counsel are responsible for similarly
19 improper behavior to harass Plaintiff, and that Defendant's motion for sanctions violates
20 Rule 11.

21 **LEGAL STANDARD**

22 Courts have inherently broad authority to impose penalties and sanctions for a
23 party's failure to comply with the rules of conduct governing the litigation process.
24 Through the district court's inherent powers, monetary sanctions in the form of attorney's
25 fees may be imposed against a party who acts in bad faith, such as disrupting the
26 litigation process of failing to abide by a court order. *Leon v. IDX Systems Corp.*, 464 F.
27 3d 951, 961 (9th Cir. 2006); *see also Rodeway Exp., Inc. v. Piper*, 447 U.S. 752, 766
28 (1980).

1 The most severe form of sanctions are terminating sanctions, which may be
 2 appropriate where a party fails to comply with a court order. Rule 37(b)(2) gives courts
 3 the authority to impose sanctions when a party has failed to comply with a discovery
 4 court order. Terminating sanctions may be used for “striking pleadings in whole or in
 5 part” or “dismissing the action or proceeding in whole or in part.” Fed. R. Civ. P.
 6 37(b)(2) (iii), (v). Courts have developed the following five factor to consider in
 7 determining whether sanctions are appropriate under Rule 37(b)(2): (1) the public’s
 8 interest in expeditious resolution of litigation; (2) the court’s need to manage its dockets;
 9 (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring
 10 disposition of cases on their merits; and (5) the availability of less drastic sanctions, such
 11 as whether the court has considered lesser sanctions, whether it tried them, and whether it
 12 warned the recalcitrant party about the possibility of case-dispositive sanctions.
 13 *Connecticut General Life Insurance Company v. New Images of Beverly Hills*, 482 F. 3d
 14 1091, 1097 (2007) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003)).
 15 Terminating sanctions are severe and justified only when the sanctioned party’s
 16 violations are a result of the “willfulness, bad faith, or fault” of the party. *Jorgensen*, 320
 17 F.3d at 912.

18 Regardless of whether sanctions are imposed under the Federal Rules or pursuant
 19 to a court’s inherent power, the decision to impose sanctions lies within the sound
 20 discretion of the court. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109–14 (9th Cir.
 21 2005) (reviewing sanctions imposed under the court’s inherent power); *Payne v. Exxon*
 22 *Corp.*, 121 F.3d 503, 510 (9th Cir. 1997) (upholding sanctions imposed under the Federal
 23 Rules).

24 DISCUSSION

25 It is apparent from the documents attached to the instant motion that Plaintiff has
 26 engaged in improper and unprofessional conduct. It is also apparent, however, that both
 27 parties have utilized court filings as a means to further “mudsling” accusations at each
 28 other and at counsel. The briefing from both sides includes sparse legal argument,

1 comprised mainly of complaints of improper conduct, rhetorical questions, excessive
 2 emphases, and exaggeration. The Court will not entertain any such further conduct by
 3 either side.

4 More importantly, the Court will not permit Plaintiff to further harass Defendant or
 5 defense counsel. Although proceeding pro se, Plaintiff is a sophisticated litigant who
 6 lacks neither the knowledge nor the means to comply with local rules.² Pro se status does
 7 not exempt a litigant from engaging in respectful and professional conduct. Civil Local
 8 Rule 83.11 governs persons appearing without an attorney and expressly states that
 9 persons appearing pro se are bound by the rules of court. *See* Civ.L.R. 83.11 (“Any
 10 person appearing propria persona is bound by these rules of court and by the [Federal
 11 Rules of Civil Procedure] . . . as appropriate.” The Local Rules specifically state an
 12 attorney in practice before this court must not:

- 13 a. Disparage the intelligence, ethics, morals, integrity or behavior or opposing
 14 parties or counsel unless such characteristics are at issue.
- 15 b. Disparage any person’s gender, race, religious creed, color, national origin,
 16 ancestry, physical handicap, medical condition, marital status or sexual
 17 orientation.
- 18 c. Knowingly participate in litigation or any other proceeding that is without
 19 merit or is designed to harass or drain the financial resources of the opposing
 20 party.
- 21 d. Arbitrarily or unreasonably deny an opposing counsel’s reasonable request
 22 for cooperation or accommodation.
- 23 e. Serve motions and pleadings on the opposing parties or counsel at a time or
 24 in a manner that will unfairly limit their opportunity to respond.

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 26
 27 ² For example, Plaintiff appears to have earned a Juris Doctorate degree, (*see* Doc. No.
 28 57-12), successfully moved for electronic filing access, (Doc. Nos. 9, 13), and filed or
 opposed several motions through written memoranda timely filed with the Court.

- 1 f. Seek sanctions against or the disqualification of any other attorney for any
- 2 improper purpose.
- 3 g. Engage in excessive, abusive discovery, or delaying tactics.
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5 Thus, although Plaintiff is not an attorney, he is bound by the Local Rules
6 governing professionalism. Judge Stormes stated as much in her August 26, 2015 order,
7 noting that Plaintiff was required to abide by the Local Rules governing professionalism.
8 (*See* Doc. No. 40 at 10) (“So even though he is pro se, this district’s Local Rules require
9 Ewing to follow the rules of professionalism outlined in Civil Local Rule 83.4, which
10 require him to, among other things, ‘be courteous and civil in all communications’ and
11 ‘attempt to informally resolve disputes with opposing counsel.’”).

12 Aside from the conduct proscribed by the Local Rules, this Court previously
13 cautioned Plaintiff not to utilize his pro se status to engage in improper conduct. (*See*
14 Doc. No. 20 at 16.) Despite this admonition, the Local Rules, and prior requests for
15 sanctions by Defendant, Plaintiffs conduct remains unprofessional. However, having not
16 previously threatened the imposition of monetary sanctions, let alone case-dispositive
17 sanctions, and in light of Plaintiff’s pro se status, the Court will not impose sanctions at
18 this time. In the future, however, given three distinct court orders apprising Plaintiff of
19 his obligation to act professionally and ethically during the course of this litigation, the
20 Court will not hesitate to sanction Plaintiff for further improper conduct of violations of
21 this order. This includes monetary and or terminating sanctions.

22 Additionally, in an effort of end the unprofessional conduct rampant throughout
23 the record, the Court further delineates prohibited conduct that may warrant the future
24 imposition of sanctions:

- 25 1. All parties and counsel must cease personal attacks and investigations into private
- 26 affairs of opposing parties and their counsel. This includes investigating or
- 27 otherwise referencing unrelated matters such as purported tax liens, orders of
- 28 contempt not issued by this Court as part of this litigation, and unrelated news

1 articles or press releases.

- 2 2. All parties and their counsel must not harass, intimidate, or threaten any party or
- 3 their attorney. This includes threats of future litigation, sanctions, and state bar
- 4 complaints, except and unless necessary to comply with certain procedural
- 5 requirements. *See, e.g.*, Fed. R. Civ. P. 11(b) (discussing requirement of safe
- 6 harbor period prior to filing motion for sanctions).
- 7 3. All parties and their counsel must not attach any unrelated private information or
- 8 communications to future court filings or communications with opposing counsel
- 9 or opposing parties. This includes personal information about defense counsel,
- 10 such as state bar records or printouts from the state bar website.
- 11 4. Plaintiff must not contact Defendant Phillip Flora directly either through email,
- 12 telephone, or in person without the permission of defense counsel.³
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14 Notwithstanding Plaintiff's pro se status, the Court reiterates the following:

15 The United States District Court for the Southern District of
 16 California is committed to the highest standards of
 17 professionalism and expects those standards to be observed by
 18 lawyers who practice before the Court. Compliance with high
 19 standards of professionalism depends primarily upon
 20 understanding the value of clients, the legal system, the public
 21 and lawyers of adhering to the voluntary standards.
 22 Secondly, compliance depends upon reinforcement by peer
 23 pressure and public opinion, and finally, when necessary, by
 24 enforcement by the courts through their powers and rules in
 25 existence.

26 While litigation may inevitably be contentious to a certain degree, advocacy does
 27 not necessitate disrespect. The parties are encouraged to focus their efforts on litigating
 28 the merits of Plaintiff's claims, while making every effort to meet the highest standards

³ Because the Court cannot foresee every instances of unprofessional conduct, this is not an exhaustive list of prohibited conduct.

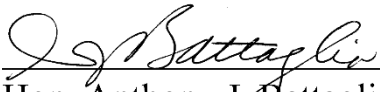
1 of professionalism expected of those who litigate in this district.

2 **CONCLUSION**

3 For the reasons set forth above, the Court **DENIES** Defendant's motion for
4 sanctions **WITHOUT PREJUDICE**.⁴ Future unprofessional or otherwise improper
5 conduct that hinders the prompt resolution of Plaintiff's claims by either party or their
6 counsel will not be met with leniency. Should such conduct occur after the date of this
7 order, the Court will entertain a motion for sanctions by either party.

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9 **IT IS SO ORDERED.**

10 Dated: April 14, 2016

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12 Hon. Anthony J. Battaglia
United States District Judge

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26 ⁴ The Court similarly **OVERRULES** Defendant's evidentiary objections to Plaintiff's
27 opposition. (Doc. No. 57-1.) Pursuant to the undersigned's Chamber Rule II(A),
28 "Objections relating to the motion should be set forth in the parties' opposition or reply.
No separate statement of objections will be allowed." Defendant's reply adequately set
forth objections to the statements within Plaintiff's opposition.